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**Hearing on Examining the Biden Administration's  
Abandoned Mine Lands and Active Mining Programs**  
House Committee on Natural Resources Subcommittee on Energy and Mineral Resources

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Thank you Chairman Stauber, Ranking Member Ocasio-Cortez, and members of the Committee for the opportunity to testify regarding the Office of Surface Mining Reclamation and Enforcement (OSMRE) and its oversight of abandoned mine lands and active mining programs.

I am a Senior Attorney with the Sierra Club, the nation's oldest and largest grassroots environmental organization. My work focuses on assisting local communities nationwide ensure coal mines minimize their pollution and are fully reclaimed once they stop production. As part of this work, I frequently interact with OSMRE staff at the national and regional level.

**I. OSMRE is not confronting the reality that we are on track to see a return to the conditions that led Congress to pass SMCRA in 1977: thousands of mines abandoned with no source of funds to complete reclamation, requiring an expansion or duplication of the taxpayer-funded AML program**

Over the 15 years that I've worked on coal mining-related issues, I've seen major transformations in the coal industry: from a boom in permitting at the peak of the coal market in the 2000s, to a period of declining production and increasing environmental violations, to multiple waves of bankruptcies and the present situation where we are seeing increasing mine abandonments and decreasing funds available to cover the costs of reclamation. Unfortunately, across this timespan OSMRE has not adjusted its approach and continues to operate as if demand for coal is never-ending and new coal mines will continue to be permitted, rather than acknowledge the reality that the industry is in decline, reclamation funding is inadequate, and communities are being forced to bear the burden of living next to disturbed areas that generate pollution and are prone to flooding and erosion. OSMRE's failure to adjust to this reality has created conditions under which, if appropriate action is not immediately taken, thousands of additional unreclaimed permits will be abandoned, the costs to be borne by nearby communities and taxpayers.

**A. Market forces have led to a permanent decline in demand for coal that is leading to rapidly decreasing production, shuttered mines, and a high risk of mine abandonments**

Every decision relating to the regulation of coal mining must be informed by a clear-eyed understanding that the demand for coal is in dramatic and permanent decline. The decline of the coal industry is well documented and attributable to the comparatively lower price of natural gas and renewable energy. In its recent October Short-Term Energy Outlook, the US Energy Information Administration (EIA) forecast that annual coal production in the U.S. will drop 2.7

percent in 2023 compared with 2022, and that this decline will then dramatically increase in 2024 with an additional 20.0 percent decrease.<sup>1</sup> EIA predicts 2024 U.S. coal production will be 465 MMst. This is about 13.1 percent below the previous low set in 2020 and 60 percent below peak coal production of 1,172 MMst in 2008. Industry-tracking experts attribute the drop in demand for coal to market forces. In a recent interview with the publication S&P Global Commodity Insights, Morningstar Research Services analyst Travis Miller said: “I just don't see a pathway to coal generation being a material part of the generation mix in the next decade and beyond. There is too much growth in renewable energy. Nuclear economics appear to be stable now with some of the tax incentives, and gas is just such a valuable generation fuel source that the US is never going to be replacing gas with coal.”<sup>2</sup>

This decline in demand for coal has already resulted in dozens of mine operator bankruptcies, and more are coming. Nearly 70 coal mine operators filed for bankruptcy between 2012 and 2020.<sup>3</sup> Four of the largest mine operators—Patriot Coal, Alpha Natural Resources, Arch Coal, and Peabody Energy—offloaded almost \$2 billion in environmental liabilities and more than \$3 billion in retiree liabilities through the bankruptcy process between 2012 and 2017.<sup>4</sup> Because coal production and the demand for coal continue to drop, more mine operator bankruptcies are coming. And these are much more likely to be total liquidations resulting in large waves of abandoned permits. Indeed, we're already seeing permits that were transferred out of prior bankruptcies go back through the bankruptcy process as the operators who acquired them on the cheap are themselves forced to liquidate. The prospects for these permits to be reclaimed by industry without cost to taxpayers is extremely low.

## **B. Congress' intent in passing SMCRA in 1977 is being frustrated by OSMRE's inaction**

Congress passed the Surface Mining Control and Reclamation Act (SMCRA) in 1977 to address the problem of mines being abandoned unreclaimed, finding that “there are a substantial number of acres of land throughout major regions of the United States disturbed by surface and underground coal on which little or no reclamation was conducted, and the impacts from these unreclaimed lands impose social and economic costs on residents in nearby and adjoining areas as well as continuing to impair environmental quality.”<sup>5</sup> Congress took two fundamental approaches in SMCRA, providing for clean-up of already abandoned mines, and setting out regulations to prevent any new mines from being abandoned unreclaimed. Title IV of SMCRA

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<sup>1</sup> U.S. Energy Information Administration, Short-Term Energy Outlook, October 2023. Available at <https://www.eia.gov/outlooks/steo/archives/Oct23.pdf>

<sup>2</sup> Kuykendall, T. “Monthly US coal production heading for a cliff, starting ... now,” S&P Capital IQ, October 30, 2023. Available at <https://www.capitaliq.spglobal.com/apisv3/spg-webplatform-core/news/article?KeyProductLinkType=2&id=78096170>

<sup>3</sup> Kuykendall, T. “Roster of US coal companies turning to bankruptcy continues to swell.” SNL. June 4, 2015. <https://www.snl.com/interactiveX/Article.aspx?cdid=A-32872208-12845&FreeAccess=1>; Saul, J. and Doherty, K. U.S. Bankruptcy Tracker: Coal's a Canary in the Mine for Energy. Bloomberg. December 8, 2020. <https://www.bloomberg.com/news/articles/2020-12-08/u-s-bankruptcytracker-coal-s-a-canary-in-the-mine-for-energy>

<sup>4</sup> Macey, J. and Salovaara, J. “Bankruptcy as Bailout: Coal Company Insolvency and the Erosion of Federal Law,” Stanford Law Review. April 2019. Available at <https://review.law.stanford.edu/wp-content/uploads/sites/3/2019/04/Macey-Salovaara-71-Stan.-L.-Rev.-879.pdf>

<sup>5</sup> 30 U.S.C. §1201(h).

created the Abandoned Mine Lands program to provide funding to clean up the existing inventory of unreclaimed sites across the county. In Title V, Congress created a structure of regulations to ensure that no new mines would ever again be abandoned unreclaimed or without the means for regulators to immediately complete reclamation. This regulatory structure for new coal mines is built around two central requirements. First, mine operators must provide bonds or other financial assurances adequate to cover the full costs of any reclamation that may be outstanding should the company go out of business. Second, mine operators must conduct reclamation as they go, so that at any given time the total disturbed area (and therefore the remaining reclamation cost) is as small as possible. SMCRA is currently being implemented in a manner that fails on both fronts.

**C. OSMRE and state regulators are failing to require adequate bonding, meaning the money is not there to pay for reclamation of abandoned sites**

SMCRA requires that before a mining operation can begin, the permit holder must provide adequate financial assurances. These can take a variety of forms, including third-party surety bonds and participation in state-administered bond pools. As currently implemented, SMCRA bonding fails to deliver on Congress' intent in two ways. First, regulators often underestimate the actual costs of reclamation in a manner that keeps bonding expenses low for operators, but leads to there being inadequate funds to actually pay for reclamation. In 2021, in the bankruptcy liquidation of major coal mine operator Blackjewel LLC, the Kentucky Energy and Environment Cabinet estimated that the cost of reclaiming 33 permits revoked by order of the court would exceed those permits' bond amounts by over \$28 million. This came after an earlier report by OSMRE in 2017 found that the bonds forfeited by bankrupt coal companies in Kentucky covered only 52.8 percent of actual reclamation costs.<sup>6</sup> A 2021 West Virginia legislature audit found that individual bonds in the state cover only 10 percent of projected reclamation costs, leaving the state's inadequate Special Reclamation Fund bond pool to cover the entire shortfall.<sup>7</sup> But, as discussed below, those costs would quickly overwhelm and drain that bond pool.

Second, the forms of financial assurances allowed by regulators are not appropriate for the current reality of declining production and increasing abandonments. Surety bonds may seem reliable because they pass the risk on to third-party bond providers. But a small number of sureties have been allowed to dominate the market, meaning they are dramatically over-exposed to a declining industry and have issued bonds far in excess of what they can afford to pay out. This creates a risk of widespread defaults, and also gives those bond providers enormous leverage over regulators. The West Virginia audit found that a single surety bond provider has issued bonds covering approximately two-thirds of bonded reclamation costs in the state, leaving the state extremely vulnerable should that provider default. Five surety companies, including that one, have issued 91 percent of bonding in the state.<sup>8</sup>

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<sup>6</sup> OSMRE Annual Evaluation Report for Kentucky, 2017. Available at <https://perma.cc/8WWU-V2F4>

<sup>7</sup> West Virginia Legislative Audit Report, "WV Department of Environmental Protection Division of Mining & Reclamation - Special Reclamation Funds Report," June 7, 2021, at p. 13. Available at [https://www.wvlegislature.gov/legisdocs/reports/agency/PA/PA\\_2021\\_722.pdf](https://www.wvlegislature.gov/legisdocs/reports/agency/PA/PA_2021_722.pdf)

<sup>8</sup> West Virginia Legislative Audit Report, June 2021.

State-run bond pools also carry enormous risks. By definition, these bond pools are intended to hold only a fraction of the funds actually needed to cover reclamation costs for all of the permits participating in the pool. How much money is maintained in the pool is determined by an actuarial analysis. But this analysis is inherently backward-looking, being based on historic rates of forfeiture from a time when demand for coal was high. The actuarial analyses, and therefore the amount of funds maintained in the pools, do not account for the coming avalanche of abandoned mines. And even if regulators try to increase the amount of funds in the pools, they are constrained by the fact that the traditional sources of funds—new permits issued and tons of coal mined—are also dwindling. Just as the demand for funds *from* these pools is increasing, the source of funds *into* the pools is shrinking. Bond pools are currently utilized in West Virginia, Kentucky, Virginia, Indiana, and Ohio. A recent actuarial analysis of the Ohio bond pool noted that coal production in the state dropped by more than 50% between 2019 and 2020, and found that the bankruptcy of any one of the five largest mine operators in the state would wipe out the entire bond pool.<sup>9</sup>

Inadequate bonding also makes it less likely that operators will complete reclamation. SMCRA provides for the release of bonds in phases. The largest portion, approximately 60 percent, is released once backfilling and regrading is complete. The next tranche is released following revegetation. And the smallest portion is released at final reclamation. If bonds are too small, then operators lack an adequate incentive to secure bond release—particularly the final stages.

An example from West Virginia illustrates a number of these problems with reclamation bonding. In early 2020, one of the largest operators of coal mines in West Virginia—ERP Compliant Fuels—was teetering on the verge of bankruptcy. Many of ERP’s mines had been acquired through the bankruptcies of other operators, including Patriot Coal, which itself had been spun off from Peabody Energy and Arch Coal. Rather than allow ERP to go into bankruptcy, which would have risked approximately 100 unreclaimed mines becoming the responsibility of the state, the West Virginia Department of Environmental Protection took the extreme step of placing the company into a special receivership. In its court filings seeking creation of that receivership, WVDEP stated that “DEP stands poised at the precipice of having to revoke the Defendant’s permits, forfeiting the associated surety bonds, and transferring the responsibility for cleaning up the Defendant’s mess to the State’s Special Reclamation Fund, potentially bankrupting the Defendant’s principal surety and administratively and financially overwhelming the Special Reclamation Fund, the State’s principal backstop for all revoked and forfeited mine sites in West Virginia.”<sup>10</sup> We’re now three-and-a-half years into that “special receivership,” many of ERP’s mines remain unreclaimed, and it appears clear that the special receiver will not have the funds to complete the reclamation. The 2021 West Virginia audit report indicated that at the time of the report, ERP still held 91 permits, after forfeiting or transferring some permits. Those permits are backed by \$83 million in reclamation surety bonds.

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<sup>9</sup> Taylor & Mulder, Inc., “Ohio Reclamation Forfeiture Fund Actuarial Study as of December 31, 2022.” Available at <https://ohiodnr.gov/wps/wcm/connect/gov/8342b87d-3f06-466c-a0e6-5d00185a9c27/May+2023+actuarial+study+of+Reclamation+Forfeiture+Fund.pdf?MOD=AJPERES&CVID=ozU-XML>

<sup>10</sup> West Virginia Department of Environmental Protection’s Motion for Temporary Restraining Order and Preliminary Injunction, March 26, 2020, at p. 3; and Affidavit of Harold Ward, Acting Director WVDEP, March 26, 2020, at para. 62-64. Available at <https://www.sierraclub.org/sites/default/files/2023-11/Motion%20for%20TRO%20and%20Ward%20Affidavit.pdf>

However, because bonds in West Virginia typically only cover 10 percent of the actual reclamation liability, the true outstanding cost of reclamation at the remaining ERP mines could be as high as \$830 million. As of March 2021, the West Virginia bond pool contained approximately \$36 million, with another approximately \$150 million in a separate fund for water treatment.<sup>11</sup> The ultimate fate of the ERP permits, and the communities that they continue to impact, remains uncertain, though it is clear that significant costs will ultimately be passed on to the state. In the wake of ERP's failure, West Virginia has not made any substantive changes to its bonding program, nor has OSMRE compelled any such changes.

The federal SMCRA statute also authorizes the use of "self-bonding," which in practice equates to no bonding at all. At the time that they entered bankruptcy, Alpha, Arch, and Peabody each had hundreds of millions of dollars of self-bonded reclamation liabilities. This allowed them to negotiate extremely favorable agreements with regulators, including allowing them to continue operating even though they no longer satisfied SMCRA's reclamation bonding requirements.<sup>12</sup> Fortunately, in the wake of these major bankruptcies, most self-bonds have been replaced. However, five states have allowed existing self-bonds to remain in effect, and an additional 16 states still maintain the option to utilize self-bonding under state law. For example, Virginia allowed the Justice Group to maintain its self-bonds. In return, the Justice Group has flouted reclamation requirements with impunity, aware that the regulator cannot afford to fully enforce the law out of fear of precipitating abandonment of these unbonded sites.

**D. OSMRE and state regulators are failing to enforce reclamation requirements, magnifying the reclamation burden when those mines are abandoned**

SMCRA's reclamation requirements are being implemented and enforced by OSMRE and state regulators in a manner that makes it likely significant reclamation work will remain outstanding when permits are abandoned.

Although SMCRA requires "contemporaneous reclamation," in practice OSMRE and state regulators have allowed operators to focus on coal removal at the expense of reclamation. But once all of the coal has been removed, operators have an incentive to move their resources elsewhere. For example, in West Virginia, Brooks Run Mining's Seven Pines mine is a large mountaintop removal strip mine. According to West Virginia inspection reports, the number of disturbed and reclaimed acres at the site have not changed since September 2018. In December 2020, the West Virginia regulator cited the mine for failing to conduct contemporaneous reclamation.<sup>13</sup> Local communities feared that the significant drop in the price of coal at that time meant that the mine would likely be abandoned. The company appeared to have pulled all resources from the site, and even allowed its Clean Water Act discharge permit to lapse. Then, when coal prices temporarily rebounded in 2022, the company resumed mining. According to coal production records from the West Virginia Office of Miners' Health, the mine produced

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<sup>11</sup> West Virginia Legislative Audit Report, June 2021.

<sup>12</sup> Macey, J. "Bankruptcy as Bailout."

<sup>13</sup> West Virginia Department of Environmental Protection, Notice of Violation 41 for permit S201002, Dec. 11, 2020. Available at <https://www.sierraclub.org/sites/default/files/2023-11/WVDEP%20S201002%20NOV%2041%2012-11-2020.pdf>

261,430 tons of coal in 2022, making it the 16th highest producing mine out of the 83 mines with any coal production that year.<sup>14</sup> But the mine still did not conduct any reclamation, despite the influx of revenue and the generation of spoil material. Instead, in April 2023 the West Virginia mine regulator conducted a flyover of the mine site, reporting extensive areas of exposed highwall.<sup>15</sup> The regulator again cited the company in August 2023 for failing to conduct the required reclamation, stating “NOV 41 has been running for more than 2.5 years and permittee has had ample time and has had sufficient excess material to fully backfill and grade the ‘Apple Core’ area.”<sup>16</sup> Now that coal prices have dropped, the history of violations and lack of reclamation at this site make it unlikely that work will be completed by the operator. This example illustrates how, despite the issuance of paper violations by the regulator, the coal mining industry understands itself to have free rein to maximize profit while ultimately passing reclamation costs on to taxpayers and the local community.

Regulators are also allowing mine operators to abuse the process for placing mines into “idle” or “temporary cessation” status, and are failing to effectively enforce requirements that active mines either produce coal or conduct reclamation. In theory, the process for allowing mines to be idled or placed into temporary cessation is supposed to provide for a temporary pause in operations, for example during a short-term drop in coal prices. But this process is regularly abused, including by operations with no intent—or ability—to ever resume production. The result is mines left in a persistently unreclaimed status. The West Virginia audit found twenty-six surface mine sites that have been allowed to remain inactive for more than ten years, including nine permits that have been inactive for more than twenty years. At the time of the report, 160 permits, bonded for \$72 million, were inactive. Out of 100 inactive status applications reviewed, the audit found 171 instances where the applicant failed to meet the requirements for inactive status, yet the mine was allowed to cease operations without reclamation.<sup>17</sup>

In many cases, mine operators don’t even bother to seek or obtain formal permission to stop production. As a result, the official permit status maintained by the regulator may not reflect the on-the-ground reality. Preliminary analysis by Appalachian Citizens’ Law Center (ACLC) suggests that a large portion of Kentucky’s surface coal mines have been idled, but nonetheless are still listed as active. ACLC examined 126 permits that the state has categorized as actively producing coal, but found that nearly 40 percent of them have actually had no coal removal since 2020 and have not been moved into reclamation status. These permits alone cover nearly 12,000 disturbed acres of land.<sup>18</sup>

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<sup>14</sup> West Virginia Office of Miners’ Health, CY2022 Annual Report and Directory of Mines. Available at <https://minesafety.wv.gov/wp-content/uploads/2023/07/CY-2022-Annual-Report.pdf>

<sup>15</sup> West Virginia Department of Environmental Protection aerial inspection photos for the Brooks Run Seven Pines mine, April 27, 2023. Available at <https://www.sierraclub.org/sites/default/files/2023-11/Aerial%20photos%20of%20Seven%20Pines%20mine.pdf>

<sup>16</sup> West Virginia Department of Environmental Protection, Cessation Order for Notice of Violation 87 for permit S201002, August 14, 2023. Available at <https://www.sierraclub.org/sites/default/files/2023-11/WVDEP%20S201002%20CO%20for%20NOV%2087%208-14-2023.pdf>

<sup>17</sup> West Virginia Legislative Audit Report, June 2021, at pp. 3-4.

<sup>18</sup> Appalachian Citizens’ Law Center, “Functionally Abandoned ‘Active’ Surface Mine Permits in Kentucky” November 2023. Available at <https://drive.google.com/file/d/11pW0HWHaBiQK1x5cfvCHzc2a05Qx-1o5/view>.

These paperwork exercises are being used to shield the fact that many mines—maybe even the majority of mines—are being permanently shut down in an unreclaimed condition. Workers are let go, equipment is sold or moved off site, operators have no intention or expectation of ever resuming operations. These are abandoned mines. But on paper, they continue to be listed as active or just temporarily idled. Regulators turn a blind eye, or actively facilitate this practice, because so long as these mines are not officially abandoned, the regulators don't need to contend with the lack of money to pay for reclamation.

The failure of OSMRE and state regulators to compel operators to complete reclamation, and to accurately track the actual status of operations, has made it difficult for the public to understand the actual state of the coal industry. One problem is that production data is tracked on an independent system that does not align with SMCRA permit numbers, so it can be difficult to tell which mines listed as active are actually producing. In an effort to close this data gap, members of Congress—including members of this Subcommittee—recently submitted letters to the Government Accountability Office (GAO) requesting a report compiling information on actual coal production and reclamation. Should the GAO agree to conduct this study, full and complete participation by OSMRE and state regulators will be critical.

Even when operators conduct reclamation, OSMRE and other regulators often fail to require compliance with SMCRA's reclamation requirements, or the applicable requirements prove inadequate and inappropriate. OSMRE directly implements SMCRA on certain tribal lands, including on Navajo and Hopi land in Arizona where Peabody Energy operated the Black Mesa and Kayenta mines for 50 years. Black Mesa closed in 2005 and Kayenta in 2019. Peabody's reclamation efforts have been inadequate to restore the land and water impacted by its mining. In particular, Peabody has failed to repair the damaged Navajo Aquifer, the only source of drinking water for the more than 50,000 people living on Black Mesa. Rather than use native vegetation adapted to the arid local environment of this part of the Southwest, Peabody has been allowed to reseed an overwhelming majority of the tens of thousands of disturbed acres with non-native Midwestern grass species that will not be viable over the long-term. Local residents have repeatedly tried to raise these concerns with OSMRE, including asking OSMRE to treat closure of the Kayenta mine as a significant permit revision that would allow for public participation, local input, and a comprehensive all-of-government review of reclamation plans that have not been updated in more than three decades. Instead, OSMRE has allowed Peabody to delay both reclamation and required permit revisions, to the detriment of the community. Although Peabody is one of the largest coal mine operators in the world, it is subject to the same negative economic forces affecting the entire industry. Local residents worry that OSMRE's inaction exposes their communities to the risk that Peabody could ultimately abandon the sites unreclaimed and with major mine-related damage to the region's main aquifer unaddressed.

These issues of inadequate reclamation and the need for public participation are magnified at sites where surety companies have opted to complete reclamation in lieu of paying out the face value of bonds. In a letter sent to OSMRE in December 2021, Sierra Club and fourteen other community groups requested that the agency issue a directive clarifying public participation rights regarding surety-led reclamation efforts, including modifications to the approved reclamation plan, and at bond release. To date, OSMRE has provided no substantive response to this request.

## **E. Community health and safety are at stake if OSMRE continues to fail to act**

Our nation has already placed an enormous burden on the communities that live in coal producing regions. These communities have seen their forests slashed, mountains leveled, streams polluted, and air choked with dust, all to subsidize coal-generated power. But at least SMCRA promised that at the end of the day the sites would be cleaned up, maybe even returned to some other productive use. We are now breaking that promise through OSMRE's inaction. Abandoned unreclaimed mine sites pose a variety of threats to nearby communities.

In July 2022, communities in eastern Kentucky experienced unprecedented and devastating flooding. Dozens of people died in the floods and thousands of homes were destroyed or significantly damaged.<sup>19</sup> Local residents ascribe the severity and destructiveness of the flooding to the presence of unreclaimed coal mines on the ridgelines directly above the most impacted communities. Unreclaimed coal mines contribute to extreme flooding and ancillary effects such as landslides due to factors including the absence of vegetation to absorb runoff, the instability of soil, and poorly maintained drainage systems that fail to capture or redirect runoff. In the aftermath of the flooding, local community members filed at least 125 requests for inspection with the Kentucky mine regulator, documenting flood-related impacts at local mine sites including slides, slips, subsidence, pond failure and more. In February 2023, the organization Kentuckians For The Commonwealth sent a letter to OSMRE requesting an investigation into "the extent to which the cumulative impact of surface mining, past and ongoing, exacerbated the devastating toll of lives, homes, businesses and property lost during the flood."<sup>20</sup> The letter also requested an investigation into the failure of the Kentucky regulator to properly enforce SMCRA prior to the flooding, noting that "[w]e are gravely concerned that incomplete reclamation of inactive mines and regulatory failure to enforce contemporaneous reclamation of active mines contributed to the devastation of the July 2022 flood." OSMRE has not responded to the community group's letter.

Some abandoned mines include inadequately secured mine portals allowing access to dangerous underground mine works. In 2018, three people were trapped for days in a West Virginia mine after entering the mine in search of copper and other materials to sell for scrap.<sup>21</sup> Local residents frequently access mine sites when hunting, riding ATVs, and engaging in other recreation activities. In Tennessee, OSMRE inspection reports for a mine operated by Kopper Glo have repeatedly noted the presence of open mine portals. A March 2023 report noted that "[t]he fence at the entrance to the face-up area has been cut and the gate is open. Buildings have been removed from the site. Tipple remains in the pit area. Portals are open. There is non-coal waste

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<sup>19</sup> Elamroussi, A. and Andone, D. "Death toll in Kentucky floods rises to 28 as area braces for more rain," CNN.com, July 31, 2022. Available at <https://www.cnn.com/2022/07/31/weather/kentucky-appalachia-flooding-sunday/index.html>

<sup>20</sup> Giffin, C. "Did coal mining play a role in 2022 Kentucky flood deaths? Group wants feds to investigate," Louisville Courier Journal, Feb. 13, 2023. Available at <https://www.courier-journal.com/story/news/local/2023/02/13/group-wants-federal-investigation-of-coal-mining-role-in-kentucky-flood-deaths/69890515007/>

<sup>21</sup> Holcombe, M., "They went into an abandoned mine to steal copper, police say. Then they got trapped," CNN.com, Dec. 13, 2018. Available at <https://www.cnn.com/2018/12/12/us/west-virginia-abandoned-mine-trapped/index.html>



throughout the permit that needs to be disposed of. The gate was open at time of inspection.”<sup>22</sup> Several months later, a June report for the same mine noted “Mine Portals are exposed and there are signs of vandalism at the entries. Fencing and barricades were installed at mine openings when active operations ceased. Access to the site was also restricted with fencing and locked gate. The gate was cut and not replaced. The fencing and barricades at mine openings have been removed or vandalized. There are signs of 3rd party disturbance at the mine openings.”<sup>23</sup> Despite these clear signs of abandonment, and the documented presence of dangerous open mine portals, the mine was listed as “active” on these inspection reports. Even more shocking, OSMRE approved a permit renewal for the mine site in April 2023, three-and-a-half years after the renewal application had been filed, and even after the March inspection clearly showed the site to be abandoned.

Unreclaimed surface coal mines often include thousands of feet—sometimes miles—of exposed highwalls. A highwall is the unexcavated face of exposed coal and overburden—essentially an artificial cliff that may be dozens of feet high. Highwalls pose hazards to anyone accessing the site, whether from the risk of falls from the top, or being struck by falling or collapsing materials at the bottom. The Mine Safety and Health Administration has issued a safety alert for highwalls.<sup>24</sup> In addition, highwalls can serve as sources of mining pollution, as water that has seeped through pollutant-bearing materials may be discharged directly to surface streams without passing through soil that can sometimes serve as a filter to remove certain pollutants. Mine operators are supposed to minimize the length of exposed highwall, using newly mined material to reclaim previously mined areas. In practice, operators often prefer to dump this spoil material into valley fills rather than reclaim highwalls.

Abandoned mines also serve as sources of water pollution. Surface coal mines, particularly in Appalachia, dispose of excess mine spoil by dumping it into streams as valley fills. Once in place, the water moving through this material picks up pollutants and carries them downstream. This water may require active treatment for years in order to meet water quality standards. When mines are abandoned, they stop operating treatment systems. Regulators may also seek to avoid the costs of water treatment, particularly if they failed to require adequate bonding. A series of citizen enforcement suits in West Virginia finally compelled the state mine regulator to secure Clean Water Act permits for bond forfeiture reclamation sites.

#### **H. OSMRE must adapt to the new reality that declining coal production has rendered many traditional enforcement tools ineffective**

One challenge for OSMRE, which the agency has yet to confront, is that some of the enforcement tools provided in SMCRA presume a widespread ongoing interest on the part of operators in securing new permits and in conducting new coal removal. For example, SMCRA

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<sup>22</sup> OSMRE Inspection Report, Permit 3229, March 14, 2023. Available at <https://www.sierraclub.org/sites/default/files/2023-11/3229%20Q2%20FY23%20Complete%203.14.2023.pdf>

<sup>23</sup> OSMRE Inspection Report, Permit 3229, June 21, 2023. Available at <https://www.sierraclub.org/sites/default/files/2023-11/3229%20Q3%20FY23%20Complete%20followup%20FTACO%20openings%20NOV%20liability%206.21.2023.pdf>

<sup>24</sup> U.S. Dept. of Labor, Mine Safety and Health Admin., “Highwall - Safety Alert.” Available at <https://www.msha.gov/highwall-safety-alert>

requires that mine operators with unabated violations be placed on an “Applicant/ Violator System” list, and prohibits regulators from issuing permits to operators appearing on this list. This program is completely ineffective as a deterrent in the current moment when the majority of operators have no intention to acquire any additional permits.

Another potentially powerful tool provided under SMCRA is the ability of regulators to initiate bond forfeiture at operations that have ceased complying with SMCRA. By requiring financial assurances adequate for the regulator to complete reclamation, SMCRA was supposed to free regulators to utilize bond forfeiture whenever necessary. In practice, OSMRE and state regulators have proven extremely hesitant to actually invoke this power. Because they know that bonding is inadequate, regulators have become reluctant to invoke bond forfeiture. The example of West Virginia’s approach to ERP, discussed above, provides one such example of the lengths to which regulators will go to avoid using bond forfeiture. Another example comes from Kentucky, where, as of June 2022—more than a year after conclusion of the Blackjewel and Cambrian bankruptcies—at least 136 permits remained in the name of these and other dissolved entities. However, the Kentucky regulator had started bond forfeiture proceedings for only 37 of those permits. Although the regulator may be hoping that some other operator will come along who wants to resume operations at those sites, 100 permits had no active permit transfer application.

OSMRE has missed multiple opportunities to appear in mine operator bankruptcy proceedings. This absence has allowed funds that should have gone to site reclamation—or even site maintenance—to instead go to hedge funds and other creditors. The lack of participation by OSMRE or other mine regulators also allows unreclaimed mines to be transferred to under-financed operators who lack the means to complete reclamation, or who are prohibited from receiving new permits. During the 2019 Cambrian bankruptcy, neither OSMRE nor any state regulator objected to the sale of permits to three coal companies whose listing on OSMRE’s Applicant/ Violator System should have made them ineligible to hold the permits.

## **II. There is still an opportunity for OSMRE to take needed actions, but only if the agency acknowledges the reality of declining production and the need for a changed approach**

It is not too late for OSMRE to act. There is still money in the coal industry that can and must be put towards cleaning up these sites and protecting nearby communities. But first, regulators must acknowledge the reality that the coal mining industry is, and will continue to be, in decline, and consequently that the approaches that worked in 2008 will not work today. This means stopping reliance on bond pools and other financial assurance devices premised on an assumption of overall financial health within the industry. It also means rigorously enforcing contemporaneous reclamation requirements.

Most importantly, OSMRE must use its oversight authority to compile information on which mine sites are actually producing coal, which are actively conducting reclamation, and which have been functionally abandoned and pose the greatest risk of passing significant reclamation costs on to the public. To achieve this, OSMRE should require states to provide permit-specific quarterly data regarding the number of acres at each site that require backfilling and regrading,

and that require revegetation. OSMRE should also require states to provide data on the amount of coal produced from each SMCRA permit. Cross-referencing this data will highlight which permits are at the greatest risk of abandonment. OSMRE should make this data publicly available so that regulators and the public may easily understand trends, and risks, in coal production and mine reclamation.

OSMRE must also subject each state bond pool to a rigorous stress test based not on backward-looking forfeiture rates, but on a comparison of the funds currently in the bond pool against actual projected reclamation costs. At a minimum, OSMRE must evaluate the cost of completing reclamation at every mine in the state that hasn't produced coal in more than a year. This will give a more accurate estimate of the future burden on the bond pool. Similarly, OSMRE must evaluate the financial health of surety bond providers, including their total exposure to the coal mining industry. Sureties who have already provided bonding to coal mine operators far in excess of their cash reserves should be presumed to be at very high risk of defaulting and not being able to pay out bond amounts when called upon.

In the meantime, OSMRE must advise state regulators to stop allowing new permits to participate in bond pools. When you find yourself in a hole, the first thing to do is stop digging. There are still a small number of permits being issued, primarily for operations that mine metallurgical or steel-making coal. These new mines must be required to post full-cost bonds or other financial assurances. Similarly, any time a permit is transferred, regulators must evaluate the adequacy of the bond. Where a permit set to be transferred is currently participating in a bond pool, the transferee must be required to provide a full-cost replacement bond. Where a mine operator seeks to use a third-party surety bond, regulators must look at how many bonds the surety has already issued for other coal mines, and must not accept bonds from companies that are overexposed to the coal mining industry.

OSMRE must also clarify to state regulators how they should interpret and apply SMCRA's statutory requirement of "contemporaneous reclamation."<sup>25</sup> Ensuring that the smallest possible area is left disturbed and unreclaimed at any given time is the best way for regulators to minimize reclamation costs that may eventually be passed on to the public.

One common objection to implementation of these approaches—tightening bonding requirements and enforcing existing reclamation requirements—is that they will increase costs on mine operators, and thereby accelerate or precipitate mine abandonments. What these objections fail to grasp is that any mine that may be abandoned as a result of such an action has *already* been functionally abandoned. These are the "zombie" mines that appear on paper to be active, but that in reality have ceased all operations, including reclamation. Maintaining the status quo will do nothing to promote reclamation of these sites. The reality is that the operators of these mines have neither the intention nor the means to complete reclamation; and thus the sooner the permits become the responsibility of the regulators, the sooner surrounding communities will be freed from exposure to pollution and the threat of flooding. Furthermore,

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<sup>25</sup> 30 U.S.C. §1202(3) (one purpose of SMCRA is to "assure that adequate procedures are undertaken to reclaim surface areas as contemporaneously as possible with the surface coal mining operations."); 30 U.S.C. §1265(b)(16) (requiring permittees to "insure that all reclamation efforts proceed in an environmentally sound manner and as contemporaneously as practicable with surface coal mining operations...").

enforcement of the bonding and reclamation requirements does not constitute imposition of some new regulatory scheme; operators committed to complying with SMCRA—including its reclamation and bonding requirements—when they accepted their permits.

### **III. The AMLER program is an important source of funding for communities impacted by coal mining and abandoned mine lands**

The Abandoned Mine Land Economic Revitalization Program was established in 2016 to return pre-1977 abandoned mine lands (AMLs) to productive use through economic and community development. The AMLER Program provides grants to six Appalachian states and three Indian Tribes with the highest amount of unfunded AML sites. The AMLER program funds projects that benefit local communities and provide ongoing economic benefits through development of new productive uses for former mine land.

To the extent there have been delays in implementation of AMLER funding, these delays are largely attributable to a lack of state staff time to assist project applications. Generally speaking, administration of AMLER grants go through four phases before completion: application, vetting, planning, and implementation. An evaluation of the AMLER program published in June 2022 by Downstream Strategies concluded that the greatest delays in AMLER implementation occur during the planning phase, that the most significant delays occurred in projects with budgets exceeding \$5 million, that the duration of the planning phase varied state by state, and that the states with the shortest planning stages were those where state agency staff played the most active role.<sup>26</sup> The report also concluded that the OSMRE vetting phase was comparatively short, and not the primary driver of delays in the overall project development and approval process.

While it is important to promote AML site remediation and to find new productive uses for AML sites, the greatest benefit to coal producing communities will come from preventing the creation of any *new* abandoned mine lands.

### **IV. Conclusion**

More than 47 years after Congress passed SMCRA, states have still not eliminated the inventory of unreclaimed abandoned mine land sites already in existence at that time. We cannot afford to add to that inventory. Without prompt action from OSMRE, mine producing regions will see a return to the bad old days of the 1970s. Left to its own devices, the coal mining industry will continue to seek to cut costs by burdening local communities with unreclaimed mine sites, and passing reclamation costs on to taxpayers. And state regulators will continue to turn a blind eye to these issues in an effort to delay for as long as possible the point where unfunded reclamation costs will hit their balance sheets. There is a narrowing window for OSMRE to take action. First, the agency must provide a clear-eyed assessment of the number of mines neither producing coal nor conducting reclamation. Next, it must acknowledge which elements of SMCRA are no longer effective, and must utilize the remaining tools to their fullest extent. Only that way can we avoid the return of dangerous, polluting, economically unproductive abandoned mine lands.

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<sup>26</sup> Downstream Strategies, “Got Five On It: Economic Impacts and Observations of the Abandoned Mine Land Economic Revitalization Program Five Years In,” June 7, 2022. Available at <https://appvoices.org/resources/reports/GotFiveOnIt-FINAL-6-7-2022.pdf>